

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

ENDORSED FILED
IN THE OFFICE OF

AUG 30 4 55 PM '89

In re:

Request for Regulatory)
Determination filed by)
Southern California)
Rehabilitation Services)
concerning the Department)
of Rehabilitation's Field)
Operations Division Di-)
rective No. 157 (regard-)
ing vehicle purchases)
and/or modifications for)
an individual in order to)
use the Department's)
vocational rehabilitation)
training services)¹)


1989 OAL Determination No. 13

[Docket No. 88-019]

August 30, 1989

Determination Pursuant to
Government Code Section
11347.5; Title 1, California
Code of Regulations,
Chapter 1, Article 2

Determination by:


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SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not the Department of Rehabilitation's Directive concerning who receives transportation assistance for rehabilitation services is a "regulation" required to be adopted in compliance with the Administrative Procedure Act. Following filing of the Request for Determination, but prior to issuance of this Determination, this Directive was rescinded by the agency.

The Office of Administrative Law concludes that, from August 29, 1988, the date the Directive was issued, until on or about December 8, 1988--except for one paragraph of the Directive which repeats regulatory law--the Department failed to comply with the Administrative Procedure Act in that the Directive implemented, interpreted, or made specific statutory and regulatory law that governs transportation assistance for rehabilitation services.

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THE ISSUE PRESENTED ²

The Office of Administrative Law ("OAL") has been requested to determine³ whether the Department of Rehabilitation's ("Department") Field Operations Division Directive No. 157 concerning vehicle purchases and/or modifications needed for a client to have access to the Department's vocational rehabilitation training services is (1) subject to the requirements of the Administrative Procedure Act ("APA"), (2) a "regulation" as defined in Government Code section 11342, subdivision (b), and therefore (3) violates Government Code section 11347.5, subdivision (a).⁴

THE DECISION ^{5, 6, 7, 8}

The Office of Administrative Law finds that, except for one paragraph of the Directive which repeats regulatory law,:

- I. From the time of the issuance of the above noted Directive until on or about December 8, 1988, the Directive:
 - (1) was subject to the requirements of the APA⁹,
 - (2) was a "regulation" as defined in the APA, and therefore
 - (3) violated Government Code section 11347.5, subdivision (a).
- II. On December 8, 1988, the Department rescinded the Directive, thereby in effect removing it from the regulatory realm. Insofar as the Directive has been rescinded, it is no longer subject to the requirements of the APA.

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I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The California Department of Rehabilitation, one of ten departments currently located in the Health and Welfare Agency, was created in 1969. The Department's enabling act is located in the California Welfare and Institutions Code¹⁰, from which the following quotations are drawn.

The Legislature created the Department ". . . to assist and encourage handicapped individuals to attain their maximum usefulness and self-sufficiency and make adequate provision for such services as will enable them to prepare for and engage in gainful employment in order that they may make their full contribution to society. . . ." ¹¹ The above policy, the Legislature found, "should be carried out by strengthening the existing program of vocational rehabilitation, consolidating the basic rehabilitative services in a Department of Rehabilitation . . . [and] strengthening and developing services where needed" ¹² Further, in compliance with federal requirements, ¹³ the Legislature designated the Department the sole state agency for the administration of the state plan for vocational rehabilitation services, including decisions regarding eligibility, and nature and scope of vocational rehabilitation services. ¹⁴

The Department's formally adopted regulations are located in Title 9 of the California Code of Regulations ("CCR") (formerly known as the California Administrative Code). The Department also makes use of the "Regulations and Procedures Manual," the "Client Tracking System Handbook," the "Rehabilitation Administrative Manual," the "Habilitation Services Ratesetting Manual," ¹⁵ and "Administrative Directives." A prior Determination, 1988 OAL Determination No. 7, ¹⁶ addressed the questions of (1) whether the Department's policy directing counselors to work only with clients who may be fully rehabilitated within 90 days and to offer these clients only clothing and job seeking skills, and (2) whether the Department's policy specifying vocational rehabilitation counselor monthly production goals and standards were "regulations" required to be adopted in compliance with the APA. In this prior Determination OAL concluded (1) that insofar as the Department had a policy directing counselors to work only with clients who were fully rehabilitated within 90 days and to offer these clients only clothing and job seeking skills, such a policy was in violation of the APA, and (2) that in all other respects, the policies complained of, insofar as they existed, were not quasi-legislative "regulations," but rather were elements of the legislative budget process.

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Authority ¹⁷

Welfare and Institutions Code section 19006 provides:

"The [Department of Rehabilitation] may adopt, amend, or repeal, in accordance with the [APA] such rules and regulations as may be reasonably necessary to enable it to carry out its duties and powers." [Emphasis added.]¹⁸

Applicability of the APA to Agency's Quasi-Legislative Enactments

Welfare and Institutions Code section 19006, quoted above, expressly states that the Department's quasi-legislative enactments are subject to the procedural requirements of the APA.¹⁹

Additionally, the APA applies to all state agencies, except those "in the judicial or legislative departments."²⁰ Since the Department is in neither the judicial nor the legislative branch of state government, we conclude that APA rule-making requirements generally apply to the Department.²¹

Background

To facilitate understanding of the issues presented in this Request, we will discuss pertinent statutory and regulatory history, as well as the undisputed facts and circumstances that have given rise to the present Determination.

Vocational rehabilitation counseling services are provided by approximately 677 counselors located in over 100 branch and district offices of the Department throughout California. Local offices are organized into 19 districts. The Field Operations Division is the Department's direct service delivery component through its counseling staff housed in 19 districts. After clients are referred to the Department, its counselors determine individual eligibility for services. The Department then determines whether the physical or mental disability results in a substantial handicap to employment and whether the individual has a reasonable expectation of obtaining or retaining a job as the result of receiving Department services.

A district administrator is in charge of each of the 19 districts, which are organized into three "regions"--Northern, Los Angeles, and Southern. The Southern Region encompasses the Anaheim, Santa Barbara, Fresno, San Diego, Riverside, and San Bernardino districts. In charge of each Region is

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an assistant deputy director. The three assistant deputy directors report to the Deputy Director, Field Operations, Ferd Shaw ("Deputy Director Shaw"), who in turn reports to the Director. The Request under review concerns a Directive issued in 1988 by Deputy Director Shaw.

Welfare and Institutions Code section 19000 provides in part that:

"It is the public policy of the State of California to assist and encourage handicapped individuals to attain their maximum usefulness and self-sufficiency and make adequate provision for such services as will enable them to prepare for and engage in gainful employment in order that they may make their full contribution to society. . . ."

Sections 7000 through 7406 of Title 9 of the CCR contain the Department's formally adopted regulations. Article 9, subchapter 5, sections 7150 through 7176, is titled "Vocational Rehabilitation Services for Handicapped Individuals." Included in sections 7150 through 7176 are provisions concerning transportation of handicapped individuals to the Department's vocational rehabilitation services.

Title 34, Code of Federal Regulations ("CFR"), section 361.42 provides that the state plan for vocational rehabilitation services must include services for transporting individuals with handicaps for the purpose of supporting and deriving the full benefit of other vocational rehabilitation services.

Background: This Request for Determination

The following undisputed facts and circumstances have given rise to the present Determination.

The Requester, Robert D. Miller, Client Assistance Program Advocate for Southern California Rehabilitation Services, filed a Request for Determination with OAL on November 1, 1988. Mr. Miller identified State Department of Rehabilitation's Field Operations Division Directive No. 157 as a "regulation" issued by the Department in violation of section 11347.5, subdivision (a) of the Government Code. Directive No. 157 is an 18-page document which covers the following areas of vehicle purchase and/or modification:

General Conditions

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Potential to Operate, Maintain, and Replace Vehicle

Pre-Approval Process for Mobility Evaluations

Mobility Evaluations

Waiver of Mobility Evaluation

The Approval Process

Vehicle and/or Modification Issuance.

Directive No. 157 also refers to Exhibit A, The Cost Effective Worksheet, and Exhibit B, the Waiver of Mobility Evaluation, both of which were included as part of Directive No. 157. Exhibit A is a six page document and Exhibit B is a five page document. One additional item included as part of Directive No. 157 is a one-page document titled "Rates for State Vehicles 1987."²²

The Requester alleged that Directive No. 157 conflicts with CCR, Title 9, section 7165 and was being used to deny disabled clients the opportunity to pursue their educational goals and would render clients "not feasible" to receive services because they did not have access to transportation.

On June 16, 1989, OAL published a summary of the Request for Determination in the California Regulatory Notice Register, along with a notice inviting public comment.²³

OAL received the Department's Response to the Request for Determination on July 28, 1989. The Department denies that there is a rule, policy, regulation, order or standard of general application relating to vehicle purchase or modification other than that duly promulgated and published in the CCR. The Department's Response refers to a memorandum dated December 8, 1988, issued by Deputy Director Shaw to District Administrators, Program Supervisors, and Rehabilitation Counselors. This memorandum states that the Department rescinded Directive No. 157. The Response also refers to a second memorandum dated December 9, 1988, and signed by Kenneth Englebach for Deputy Director Shaw. This second memorandum repeats everything set forth in the December 8, 1988 memorandum and adds the following additional language:

"Moreover, District Administrators should
retroactively review all cases impacted by
Rehabilitation Directive #157 and make redet-

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erminations based on existing regulations."
[Emphasis added.]

II. DISPOSITIVE ISSUES

There are two main issues before us:²⁴

- (1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

" . . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part

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inquiry:

First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the informal rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

The answer to the first part of the inquiry is "yes."

For an agency rule to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order.²⁵ The Directive applied to all Department of Rehabilitation clients in need of vehicle purchase and/or modification to have access to vocational rehabilitation services.

The answer to the second part of the inquiry is also "yes."

GENERAL CONDITIONS

The "General Conditions" provisions of Directive No. 157, state that:

"Transportation is a supportive service and it cannot be provided as a sole service. Transportation services include vehicle purchase and/or modifications. Vehicles may only be purchased for a severely disabled client with ambulatory restrictions.

"Vehicles will not be purchased for a client to attend training. Other alternatives shall be used. Modifications to vehicles for a client to attend training may not exceed \$500.

"Vehicles may be purchased and/or modified at a cost in excess of \$500 only when the vocational objective is competitive employment and the counselor has documented that the client is in one of the following statuses:

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"Job Ready - Document the client's skills and work behaviors which indicate that the client is ready and able to seek employment; e.g., transferable skills, completion of training programs, etc. Document the reasons a vehicle is necessary for the client.

"Job offered or already employed as end result of IWRP[Individualized Written Rehabilitation Program]. Document that either a firm job offer exists or the client is working, and the job is suitable for the client's skills, abilities, and functional limitations and/or the employer is willing to make necessary accommodations. Document reasons that a vehicle is necessary to transport the client to and from the job and to maintain the job.

"Modifications (or repairs to modifications) costing less than \$500 may be purchased in status 06 or beyond when determined necessary for the success of the program. All other procedural requirements pertaining to purchase of modifications must be met."
[Emphasis added.]

This rule implements, interprets and makes specific the following provisions of law administered by the Department.

Welfare and Institutions Code section 19100 provides:

"The department shall provide the services defined and authorized by this part [Part 2, "Rehabilitation Services, Programs and Facilities"] to the physically or mentally impaired who are found to be eligible therefor." [Emphasis added.]

Welfare and Institutions Code section 19150 specifies the numerous vocational rehabilitation services which are to be provided to eligible persons:

". . . .

"(2) Such term [vocational rehabilitation services] also includes, after full consideration of eligibility for any similar benefit the following

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services and goods provided to, or for the benefit of, a handicapped individual:

". . . .

(f) Transportation in connection with the rendering of any other vocational rehabilitation service;

(g) Any other goods and services necessary to render a handicapped individual employable; "

[Emphasis added.]

Title 9, CCR, section 7165, states when a vehicle purchase may be made:

"(a) When other transportation alternatives have been considered and eliminated, a motor vehicle may be purchased only for severely disabled clients with ambulatory restrictions. The least expensive vehicle which meets the client's transportation needs may be provided when necessary to achieve the vocational objective documented in the IWRP [Individualized Written Rehabilitation Program]. To receive a vehicle, the following conditions shall be met:

(1) The client's vocational goal is competitive employment and one of the following conditions exist:

(A) The client is ready for or participating in vocational training; or

(B) The client has been determined to be job ready; or

(C) The client has a job offer; or

(D) The client is working in suitable employment.

(2) The client's potential income and resources shall be sufficient to maintain the vehicle in good operating condition and meet all legal requirements for operating a motor vehicle.

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"(b) Clients shall be evaluated by a mobility evaluation program or comparable service prior to the provision of a vehicle. Departmental staff shall be designated to insure that vendors providing mobility evaluations are qualified. Driving instruction shall be mandatory when recommended by a mobility evaluation program.

"(c) A vehicle may be purchased for a client who has a driver's license or the potential for obtaining a driver's license. . . ."
[Emphasis added.]

Title 9, CCR, section 7166 explains when vehicle modifications may be provided for client or Department owned vehicles:

"(a) Modifications may be provided for client or Department owned vehicles when necessary for a client to achieve the vocational objective and the following conditions are met.

(1) The conditions in Section 7165.

(2) The modification of the vehicle or the provision of accessory adaptive devices shall meet the client's mobility safety, medical, and vocational needs as documented by a mobility evaluation program.

"(b) A mobility evaluation shall be required prior to the provision of vehicle modifications."

". . . ." [Emphasis added.]

The "General Conditions" provisions of Directive No. 157 clearly interpret the above statutory and regulatory provisions of law. For example, all of the criteria set forth in the "General Conditions" section of No. 157 interpret the broad statement in Welfare and Institutions Code section 19150 that the Department shall provide transportation services in connection with rehabilitation services. The "General Conditions" provisions also add to and thus interpret and make more specific the above regulations concerning transportation assistance to rehabilitation services. These provisions of Directive No. 157 interpret additional provisions of regulatory law.²⁶

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The "General Conditions" provisions of Directive No. 157 also implement, interpret and make specific Title 34, CFR section 361.42, which provides in part:

"(a) Scope of services. The State plan must assure that, as appropriate to the vocational rehabilitation needs of each individual, the following vocational rehabilitation services are available:

.

(6) Transportation, including necessary travel and related expenses including subsistence during travel (or per diem payments in lieu of subsistence) in connection with transporting individuals with handicaps and their attendants and escorts for the purpose of supporting and deriving the full benefit of the other vocational rehabilitation services being provided. Transportation may include relocation and moving expenses necessary for achieving a vocational rehabilitation objective;"

. [Emphasis added, except for the first three words of the quotation which are italicized in the original.]

Potential to Operate, Maintain and Replace Vehicle

The "Potential to operate, maintain, and replace vehicle" provisions of Directive No. 157 contain in part the following:

"It must be determined that the client has or will have, upon obtaining employment, sufficient income and resources to operate and maintain the vehicle in good operating condition to meet all legal requirements for operating a vehicle and to replace the vehicle. The Cost Effective Worksheet (Exhibit A) [27] shall be used to make this determination. (This requirement is not necessary for modifications costing less than \$500.)

". . . ." [Emphasis added.]

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The above provision of Directive No. 157 implements, interprets and makes specific Title 9, CCR section 7165, subsection (a)(2), which states that "[t]he client's potential income and resources shall be sufficient to maintain the vehicle in good operating condition and meet all legal requirements for operating a motor vehicle." The "Potential to operate, maintain, and replace vehicle" provisions of Directive No. 157 also list the specific transportation alternatives that must be considered prior to the purchase of a vehicle and/or modifications. These provisions implement, interpret and make specific Title 9, CCR section 7165, subsection (a), which provides that other transportation alternatives must be considered or eliminated before the Department will purchase a vehicle for severely disabled clients with ambulatory restrictions.

Pre-Approval Process for Mobility Evaluations, Mobility Evaluations and Waiver of Mobility Evaluation

The third, fourth and fifth subject areas of Directive No. 157 cover "Pre-Approval Process for Mobility Evaluations," "Mobility Evaluations," and "Waiver of Mobility Evaluation," respectively. The Pre-approval provisions provide that:

"If all conditions above are met and the purchase of a vehicle and/or modifications is essential to the successful completion of the IWRP [Individualized Written Rehabilitation Program], then the counselor shall obtain approval to proceed with a mobility evaluation as follows:

All mobility evaluations leading toward vehicle purchases require prior written approval by the District Administrator or designee.

All mobility evaluations leading to vehicle modifications [sic]

All mobility evaluations leading to vehicle modifications require prior written approval by the Program Supervisor. Prior written approval by the District Administrator is required for modifications/purchases over \$2000."

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The above quoted portion of Directive No. 157 implements, interprets and makes specific subsection (b) of Title 9, CCR section 7165, which provides that:

"Clients shall be evaluated by a mobility evaluation program or comparable service prior to the provision of a vehicle. Departmental staff shall be designated to insure that vendors providing mobility evaluations are qualified"

This portion of Directive No. 157 also implements, interprets and makes specific subsections (a)(2) and (b) of CCR section 7166, which provide that:

"(a)(2) The modification of the vehicle or the provision of accessory adaptive devices shall meet the client's mobility, safety, medical, and vocational needs as documented by a mobility evaluation program.

"(b) A mobility evaluation shall be required prior to the provision of vehicle modifications."

The "Mobility Evaluations" provisions of Directive No. 157 implement, interpret and make specific CCR section 7165, subsection (b) and CCR section 7166, subsections (a)(2) and (b). The "Waiver of Mobility Evaluation" provisions which refer to an Exhibit B "A Request for Waiver of Driver Evaluation Form,"²⁸ state:

"In some cases, a waiver of mobility evaluation may be obtained when:

Client has license obtained after being disabled and no new functional limitations are present.

Counselor is able to complete and meet the conditions of the Request for Waiver of Driver Evaluation Form. (See Exhibit B)

District Administrator reviews and approves the request for Waiver of Driver Evaluations Form (Not required for modifications costing less than [sic] \$500.)

Counselors have complied with all the remaining administrative procedures and

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forwarded an approved copy of the appropriate request for waiver form to the local automotive inspector in lieu of a form evaluation report.

The counselor shall comply with all the provisions set forth in RAM Section 15256."²⁹

Approval Process; Vehicle and/or Modification Issuance

"The Approval Process," and the "Vehicle and/or Modification Issuance" provisions of Directive No. 157 restate in part requirements set forth in previous provisions of the Directive, and in part add additional requirements implementing, interpreting and making specific the above cited statutory and regulatory law.

Page seven of the Directive contains one paragraph. This one paragraph on the seventh page of the Directive text repeats Title 9, CCR, section 7166, subsection (c), and for this reason is not an "underground regulation."³⁰

WE THUS CONCLUDE THAT DIRECTIVE No. 157 IS A "REGULATION" AND THEREFORE IS SUBJECT TO THE REQUIREMENTS OF THE APA, EXCEPT FOR THE ONE PARAGRAPH ON PAGE SEVEN WHICH REPEATS EXISTING REGULATORY LAW.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

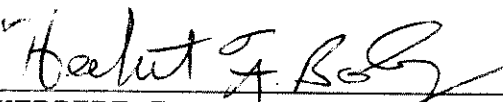
Rules concerning certain activities of state agencies--for instance, "internal management"-- are not subject to the procedural requirements of the APA.³¹ However, none of the recognized exceptions apply to the provisions of Directive No. 157.

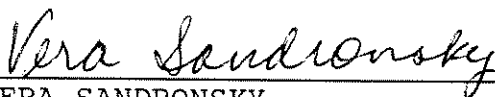
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III. CONCLUSION

For the reasons set forth above, OAL finds that--except for the one paragraph on page seven which repeats regulatory law--the Department's Field Operations Division Directive No. 157 (1) is subject to the requirements of the APA, (2) is a "regulation" as defined in the APA, and therefore (3) violated Government Code section 11347.5, subdivision (a), between the date of issuance and December 8, 1988, the date of the Department's memorandum rescinding the Directive.

DATE: August 30, 1989


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1. This Request for Determination was filed by Robert D. Miller, Client Assistance Program Advocate for Southern California Rehabilitation Services, 2458 Rives Avenue, No. 209, Downey, CA 90242, (213) 862-6537. The Department of Rehabilitation was represented by Elizabeth Solstad, Chief Counsel, Department of Rehabilitation, 830 K Street, Room 322, Sacramento, CA 95814, (916) 445-0186.

To facilitate indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination is "428" rather than "1."

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. Since April 1986, the following published cases have come to our attention:

Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693 (court found--without reference to any of the pertinent case law precedents--that the Structural Pest Control Board's licensee auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism"); Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n. 5, 211 Cal.Rptr. 758, 764, n. 5 (court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems); Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 107, 84 Cal.Rptr. 113, 128 (where agency had failed to follow APA in adopting policy statement banning licensees from employing topless waitresses, court declined to "pronounce a rule in an area in which the Department itself is reluctant to adopt one," but also noted agency failure to introduce evidence in the contested disciplinary hearings supporting the conclusion that the forbidden practice was contrary to the public welfare and morals be-

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cause it necessarily led to improper conduct), vacating, (1969) 75 Cal.Rptr. 79 (roughly the same conclusion; multiple opinions of interest as early efforts to grapple with underground regulation issue in license revocation context); California Association of Health Facilities v. Kizer (1986) 178 Cal.App.3d 1109, 224 Cal.Rptr. 247 (court ordered Department of Health Services to comply with statute directing the establishment of subacute care program in health facilities and the adoption of regulations to implement the program); Carden v. Board of Registration for Professional Engineers (1985) 174 Cal.App.3d 736, 220 Cal.Rptr. 416 (admission of uncodified guidelines in licensing hearing did not prejudice applicant); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR); Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857 (Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (invalidating internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR); Newland v. Kizer (1989) ____ Cal.App.3d ____, 257 Cal.Rptr. 450 (mandate is proper remedy to require the Department of Health Services to adopt statutorily-mandated regulations regarding temporary operation of long-term health care facilities); Pacific Southwest Airlines v. State Board of Equalization (1977) 73 Cal.App.3d 32, 140 Cal.Rptr. 543 (invalidating Board policy that aircraft qualified for statutory common carrier tax exemption only if during first six months after delivery the aircraft was "principally" (i.e., more than 50%) used as a common carrier); Sangster v. California Horse Racing Board (1988) 202 Cal.App.3d 1033, 249 Cal.Rptr. 235 (Board decision to order horse owner to forfeit \$38,000 purse involved application of a rule to a specific set of existing facts, rather

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than "surreptitious rulemaking"); and Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of proper rule articulating standard by which to measure licensee's competence).

In a recent case, Wightman v. Franchise Tax Board (1988) 202 Cal.App.3d 966, 249 Cal.Rptr. 207, the court found that administrative instructions promulgated by the Department of Social Services, and requirements prescribed by the Franchise Tax Board and in the State Administrative Manual--which implemented the program to intercept state income tax refunds to cover child support obligations and obligations to state agencies--constituted quasi-legislative acts that have the force of law and establish rules governing the matter covered. We note that the court issued its decision without referring to either:

- (1) the watershed case of Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1, which authoritatively clarified the scope of the statutory term "regulation"; or
- (2) Government Code section 11347.5.

The Wightman court found that existence of the above noted uncodified rules defeated a "denial of due process" claim. The "underground regulations" dimension of the controversy was neither briefed by the parties nor discussed by the court. [We note that, in an analogous factual situation involving the intercept requirements for federal income tax refunds, the California State Department of Social Services submitted to OAL (OAL file number 88-1208-02) in December 1988, Internal Revenue Service (IRS) Tax Refund Intercept Program regulations. These regulations were approved by OAL and filed with the Secretary of State on January 6, 1989, transforming the ongoing IRS intercept process, procedures and instructions contained in administrative directives into formally adopted departmental regulations.]

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy. Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.

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See also, the following Opinions of the California Attorney General, which concluded that compliance with the APA was required in the following situations:

Administrative Law, 10 Ops.Cal.Atty.Gen. 243, 246 (1947) (rules of State Board of Education); Workmen's Compensation, 11 Ops.Cal.Atty.Gen. 252 (1948) (form required by Director of Industrial Relations); Auto and Trailer Parks, 27 Ops.Cal. Atty.Gen. 56 (1956) (Department of Industrial Relations rules governing electrical wiring in trailer parks); Los Angeles Metropolitan Transit Authority Act, 32 Ops.Cal.Atty.Gen. 25 (1958) (Department of Industrial Relations' State Conciliation Service rules relating to certification of labor organizations and bargaining units); and Part-time Faculty as Members of Community College Academic Senates, 60 Ops.Cal.Atty.Gen. 174, 176 (1977) (policy of permitting part-time faculty to serve in academic senate despite regulation limiting service to full-teachers).

Compare, the following Opinions of the California Attorney General, which concluded that compliance with the APA was not required in the following situations:

Administrative Law and Procedure, 10 Ops.Cal.Atty.Gen. 275 (1947) (Fish and Game Commission must comply with both APA and Fish and Game Code, except that where two statutes are "repugnant" to each other and cannot be harmonized, Commission need not comply with minor APA provisions); Administrative Procedure Act, 11 Ops.Cal.Atty.Gen. 87 (1948) (directives applying solely to military forces subject to jurisdiction of California Adjutant General fall within "internal management" exception); Department of Developmental Services' Parenting Schedules, 66 Ops.Cal. Atty.Gen. 505, 511-512 (1983) (Department of Development Services' parental fee schedules fall within the "rates, prices or tariffs" exception to the APA); and Adjustment of Drug Product Prices Pursuant to Welf & Inst C [Code] § 14105.7, 67 Ops.Cal.Att.Gen. 50, 54 (1984) (adjustment of drug product prices falls within the "rate, prices or tariffs" exception to the APA).

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3. Title 1, California Code of Regulations (CCR) (formerly known as California Administrative Code), section 121, sub-section (a) provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]."
[Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['regulation'] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a ['regulation'] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

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1. File its determination upon issuance with the Secretary of State.
 2. Make its determination known to the agency, the Governor, and the Legislature.
 3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
 4. Make its determination available to the public and the courts.
- "(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.
- "(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:
1. The court or administrative agency proceeding involves the party that sought the determination from the office.
 2. The proceeding began prior to the party's request for the office's determination.
 3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added to highlight key language.]

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5. As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." (Emphasis added.)

6. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. See Title 1, CCR, sections 124 and 125. The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

The Department submitted a Response to the Request for Determination on July 28, 1989, which was considered in this determination proceeding.

7. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

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8. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

9. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for \$3.00.

10. Sections 19000 through 19856.

11. Welfare and Institutions Code section 19000.

12. Id.

13. See Welfare and Institutions Code sections 19011 and 19012. On the federal program generally, see Schornstein v. New Jersey Division of Vocational Rehabilitation Services (D. N.J. 1981) 519 F. Supp. 773, aff'd without op'n (3d Cir. 1982) 688 F.2d 824 (holding that state agency was mandated by federal law to supply interpreter to blind student).

14. Welfare and Institutions Code section 19005.1.

15. The regulatory portions of this manual have been incorporated by reference into section 7337 of Title 9 of the CCR.

16. 1988 OAL Determination No. 7 (Department of Rehabilitation, May 12, 1988, Docket No. 87-013), California Regulatory Notice Register 88, No. 22-Z, May 27, 1988, p. 1855.

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17. We discuss the affected agency's rulemaking authority (see Gov. Code, section 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

18. See also Welfare and Institutions Code section 19016, quoted in the following note.

19. Welfare and Institutions Code section 19016 provides:

"The department may prepare and promulgate regulations and statements of policy governing the pro-

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tection of records and confidential information, the manner and form of filing applications, eligibility and investigation and determination thereof, for vocational rehabilitation services, procedure for fair hearings and such other regulations and policies as are found necessary to carry out the purposes of this division [Division 10 of the Welfare and Institutions Code]." [Emphasis added.]

Though the Department has not raised this point in this proceeding, we will in the interests of thoroughness discuss the argument that section 19016 impliedly exempts the Department from APA rulemaking requirements by its use of the language emphasized in the above quotation. We reject this argument for two reasons: (1) such an interpretation of section 19016 may not be reconciled with the express language of section 19006, which unequivocally requires the Department to comply with the APA; (2) the reference to "policy statements" in section 19016 does not qualify as an APA exemption under the pertinent statutory criteria. As stated in Government Code section 11346, APA exemptions must be (1) express and (2) contained in statutes. The language of section 19016, though statutory, does not expressly exempt the Department from APA rulemaking requirements. We read section 19016 to grant the Department the power to issue non-regulatory policy statements. This reading gives effect to the language concerning policy statements, but in a way that harmonizes Welfare and Institutions Code section 19016 with section 19006 and also with Government Code section 11347.5.

20. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.
21. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-

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legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

22. This document appears to be a part of Exhibit A, although not clearly identified as such. The "Rates for State Vehicles 1987" document sets forth the monthly charge (which includes normal maintenance, fuel oil and insurance coverage), charge per mile and monthly cost at 1000 miles for unmodified vehicles leased to state agencies. The "Rates for State Vehicles 1987" document is regulatory insofar as it contains information to be used to compute one portion of the equation for the feasibility of a vehicle purchase.
23. Register 89, No. 24-Z, p. 1831.
24. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
25. Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 127 Cal.Rptr. 552.
26. In addition to the Department regulations quoted in the text of this Determination, "Transportation" is also defined in the following regulations. Title 9, CCR, section 7150, which sets forth the general provisions for vocational rehabilitation services for handicapped individuals, provides in part:

 "(a) Applicants shall receive only those vocational rehabilitation services which are required to determine the presence of a disability and rehabilitation potential.

 "(b) The full scope of vocational rehabilitation services may be provided to any handicapped individual determined to be eligible for vocational rehabilitation if those services are necessary to prepare a client for suitable employment.

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"(c) Vocational rehabilitation services may include:

. . . .

(5) Transportation"

. . . ." [Emphasis added.]

Title 9, CCR, section 7161 specifies when transportation services will be provided and the primary purpose of such services:

"(a) Transportation services shall be provided when necessary to determine rehabilitation potential or complete an approved program of vocational rehabilitation services.

The primary purpose of transportation services is to provide for those additional travel expenses resulting from the client's participation in a program of vocational rehabilitation services.

"(b) Rates of payment for transportation costs will be set by the Department."
[Emphasis added.]

27. Exhibit A titled "Cost Effectiveness of Vehicle Purchase" appears to be the "Cost Effective Worksheet" referred to in the text of Directive No. 157. Exhibit A contains in part provisions implementing, interpreting and making specific CCR section 7165, subsection (a)(2) and in part worksheets for computing the economic feasibility of vehicle purchase for the Department's clients.
28. Exhibit B includes a document titled "Request for Waiver of Passenger Evaluation" and appears to include another document titled "Request for Waiver of Driver Evaluation." Both documents set forth criteria that are additional to the criteria set forth in the text of the "Mobility Evaluations" provisions in Directive No. 157.
29. We express no opinion concerning whether Rehabilitation Administrative Manual ("RAM") section 15256 is an underground regulation: a copy of section 15256 was not included in the Request.

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30. The one paragraph on the seventh page of the Directive text provides that:

"In the event that the clients [sic] case is closed as not rehabilitated, vehicle modifications shall be retained by the Department only when they are installed in State-owned vehicles and the vehicle is retained by the Department. (NOTE: Authority cited: Sections 19006 and 19016, Welfare and Institutions Code. Reference 34 CRF 361.42.)"

Title 9, CCR section 7166, subsection (c) provides that:

"In the event that the client's case is closed as not rehabilitated, vehicle modifications shall be retained by the Department only when they are installed in State-owned vehicles and the vehicle is retained by the Department."

31. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
- b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
- c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
- d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

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- f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tande' Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$108.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

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32. We wish to acknowledge the substantial contribution of Unit Legal Assistant Melvin Fong and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.